SUBMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 189

E. B. ENGEL, PETITIONER,

vs.

J. O. DAVENPORT ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED OCTOBER 16, 1924

CERTIORARI GRANTED DECEMBER 15 1924

(30,662)

(30,662)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 697

E. B. ENGEL, PETITIONER,

vs.

J. O. DAVENPORT ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1924

[fol. 1] CAPTION—Omitted

IN SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, DEPT. No. 5

No. 132,819

E. B. ENGEL, Plaintiff,

vs.

J. O. DAVENPORT, E. J. CORNWALL, MARY L. CORNWALL, B. C. EDELIN, E. G. FOY, W. BUNNELL, P. E. MACKAY, W. E. BARTON, O. E. MARSTON, J. E. WALLACE, C. J. HENDRY CO., CHAS. C. MOORE CO., [fol. 2] MARSHALL NEWELL SUPPLY CO., WALLACE BRADFORD, M. BRENDELL, R. W. CURTIN, M. L. CULL, C. E. DAHL, F. M. DE LANO, G. DELOREN, M. A. DENSTON, C. ERICKSON, S. J. EVA, O. E. ROYLEMAN, W. J. GERDAU, E. GRUGG, E. GUENTHER, L. H. HAIN, K. HARTOG, N. HODGKINS, E. C. HUNTER, J. JACOBSEN, S. JACOBSEN, M. JOHNSON, W. H. JOHNSON, E. NELSON, *E. Nelson*, E. C. NELSON, C. W. PAGE, F. D. PARR, F. J. REMURS, R. L. ROBERTS, M. ROBERTSON, L. ROJENSTEDT, WM. H. LIVINGSTON, E. C. TUNGBERG, E. H. TOMLINSON, T. L. TOMLINSON, P. VAN BREND, H. WERTOCH, E. L. WEULE, S. WAITE, H. E. WILLIAMS, C. SGMERLE, KNOWLAND COMPANY, F. L. BARRETT, J. R. CLARSBY, S. JOHNSON, S. B. WATERS, T. C. WATTS, E. BRAMWELL, G. E. CARLTON, A. J. COLLINS, P. E. HAMS, W. R. CHAMBERLAIN, M. O. FRITZO, R. RAYMOND, A. KENDALL, H. N. NELSON, G. E. SANDERS, M. SCOFIELD, M. BISHOP, H. W. SHEPPARD, G. C. THOMPSON, C. A. H. WIKENTER, L. AYER, H. P. GRAY, C. E. MCCLENNON, C. L. EHMANN, R. E. RILENTEN, L. E. CHURCH, A. L. REBE, G. E. JOHNS, M. E. LIWANDALL, F. E. GARCIA, M. L. MACHADO, H. T. LEIBER, W. L. DAVENPORT, F. G. GRANNIS, JEWELL INVESTMENT CO., [fol. 3] R. RONCHS, K. N. KRUSE, N. CRANE, T. C. RADD, S. H. OGILBI, P. MARSDON, R. MARSDON, S. E. HITCHINGS, J. JOYCE, C. T. BLOMM, E. F. ALLEN, R. A. ALLEN, F. H. LISTER, H. A. WINGARD, M. E. HUNTINGTON, A. L. ALLEN, E. F. O'GORMAN, JOHN DOE, RICHARD DOE, FIRST DOE, and SECOND DOE, and LOUIS WEULE, Defendants.

BILL OF COMPLAINT—Filed Jan. 18, 1923

Plaintiff complains of the defendants and for cause of action alleges:

I

That on all of the dates and times herein mentioned, defendants in the caption hereof named as J. Hendry Company, Marshall Newell Supply Company, Chas. C. Moore Company, Knowland Company and Jewell Investment Co., were and now are corporations organized and existing under the laws of different states of the United States, the particular states of which organizations plaintiff does not know.

II

That the true names of the defendants in the caption hereof named as John Doe, Richard Roe, First Doe and Second Doe, are unknown to the plaintiff and he therefore prays that when such true names are ascertained, this complaint may be amended by the insertion [fol. 4] of such true names therein.

III

That on all of the dates and times herein mentioned, the defendants herein were the owners and operators of a certain vessel engaged in the merchant service of the United States of America, the home port of such vessel on all of the dates and times herein mentioned, being the Port of San Francisco, State of California, the said vessel being named the "Davenport."

IV

That prior to the 30th day of April, 1921, plaintiff was hired and employed by the defendants to work as a sailor on said vessel "Davenport" at the wages of $90.00 per month, and his board and lodging, said hiring taking place at the City and County of San Francisco, State of California, and thereafter said vessel left said San Francisco with plaintiff on board as such sailor and at said rate of wages and proceeded to Hoquiam in the State of Washington, at which place she took on board a cargo of lumber to be carried from said Hoquiam to the State of California, and there discharged and used, and plaintiff in pursuance of such hiring and employment signed shipping articles for such voyage.

V

That said vessel left said San Francisco on said voyage on or about the 20th day of April, 1921, at which time she was unseaworthy and so sontinued up to the time plaintiff was injured as hereinafter [fol. 5] stated, and the appliances on said vessel were defective in this, that there was on board of said vessel and necessary to be used thereon in carrying said cargo of lumber, an appliance called a chain lashing upon which chain lashing there was a necessary part thereof a hook called a pelican hook, that during the times herein stated said pelican hook was defective in this, that it had a flaw therein which was observable upon ordinary inspection, but no inspection was made of said hook by defendants or any thereof, and on said 30th day of April, 1921, at said Hoquiam, while plaintiff was as such sailor aforesaid assisting in placing said chain lashing around the upper part of said cargo of lumber on said vessel, the said pelican hook broke by reason of the flaw aforesaid which caused the said chain lashing to spring back and strike the plaintiff on the frontal bone of his the plaintiff's skull and fractured his said skull, by

reason of which plaintiff was compelled to go to hospital for treatment and there remain for about 14 days and has been under surgical treatment for such injuries ever since, and has lost the ability to bend his back, and lost the sense of smelling, and has suffered great physical pain and mental suffering and now and for a long time to come will suffer such physical pain and mental suffering, and is permanently injured as aforesaid, all to his damage in the sum of Fifty Thousand ($50,000.00) dollars, none of which has been paid.

VI

That the actions of the defendants in sending said vessel on the [fol. 6] voyage aforesaid so unseaworthy, and with such defective pelican hook were negligently done, and the said pelican hook broke at the place of the said flaw therein, and the particular part of said chain lashing that struck the plaintiff as aforesaid, were a part thereon called the turnbuckle.

Wherefore plaintiff prays judgment against said defendants for the sum of fifty thousand ($50,000.00) dollars and costs of this action.

H. W. Hutton, Attorney for Plaintiff.

[File endorsement omitted.]

In Superior Court of San Francisco County

Demurrer to Complaint and Order Thereon—Filed March 15, 1923

Comes now J. O. Davenport, one of the defendants herein, and demurs to the complaint of plaintiff on file herein upon the following grounds:

I

That said complaint does not state facts sufficient to constitute a cause of action against this defendant or at all.

II

That said complaint and the alleged cause of action therein set [fol. 7] forth is barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure.

Wherefore, this defendant prays that it be hence dismissed with its costs of suit herein incurred.

McCutchen, Olney, Mannon & Greene, Attorneys for said Defendants.

We hereby certify that the foregoing demurrer is in our opinion well founded in point of law and that the same is not interposed for delay.

McCutchen, Olney, Mannon & Greene, Attorneys for said Defendants.

[File endorsement omitted.]

Minute Order Sustaining Demurrer to Complaint

Thursday, August 2, 1923.

Present: Honorable Franklin A. Griffin, Judge, and officers of the court.

The demurrer of defendant J. O. Davenport to complaint, having been heretofore submitted to the court for decision and the court having fully considered the same, it is ordered that the said demurrer be and the same is hereby sustained without leave to amend.

[fol. 8] (Entered in minutes of department No. 5, Volume 178, page 288.)

In Superior Court of San Francisco County

Judgment—Filed Aug. 6, 1923

In Open Court August 2, 1923

The demurrer of defendant J. O. Davenport to complaint having been heretofore submitted to the court for decision and the court having fully considered the same it is ordered that the said demurrer be and the same is hereby sustained without leave to amend.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed that E. B. Engel, plaintiff, do take nothing by this said action as against J. O. Davenport, one of the defendants, but that judgment be and the same is hereby entered herein in favor of said defendant and against said plaintiff for said defendant's costs and disbursements incurred in this action, amounting to the sum of $—.

(Endorsed:) Recorded Aug. 4, 1923, 11.50 o'clock A. M. Vol. 203, page 1. H. I. Mulcrevy, Clerk, by R. F. Galloway, Deputy Clerk.

[fol. 9] Clerk's certificate to foregoing paper omitted in printing.

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

NOTICE OF APPEAL—Filed Aug. 6, 1923

To the Clerk of the Superior Court of State of California in and for the City and County of San Francisco:

You will please take notice: that plaintiff hereby appeals to the Supreme Court of the State of California, from the judgment given [fol. 10] and made by said Superior Court, on the 4th day of August, 1923, in the above cause, in favor of defendant J. O. Davenport, and against the plaintiff herein, upon the order of said Superior Court, given and made on the 2nd day of August, 1923, sustaining the demurrer of said J. O. Davenport to plaintiff's complaint herein, without leave to amend, and from the whole and every part of said judgment.

Dated August 6, 1923.

H. W. Hutton, Attorney for Plaintiff and Appellant.

[File endorsement omitted.]

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains, full, true and correct copies of all the papers therein set forth now on file in the office of the county clerk of the City and County of San Francisco, State of California; that the minute orders therein contained are full, true and correct copies thereof as made and entered in the minutes of the Superior Court; that the said foregoing papers shall constitute the transcript on appeal in this cause and that the appeal may be heard and determined thereon.
[fol. 11] Dated August 17th, 1923.

McCutchen, Olney, Mannon & Greene, Attorneys for Respondent. H. W. Hutton, Attorney for Appellant.

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

CLERK'S CERTIFICATE—Filed Aug. 17, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court in and for said City and County, hereby certify that I have

compared the foregoing transcript with the original papers in said action, now on file in my office, and with the orders therein made and entered in the minutes of said court, and that the papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof.

I further certify that the erasures and interlineations appearing in the foregoing transcript were made before certifying thereto.

In Witness Whereof I have hereunto set my hand and affixed the [fol. 12] seal of said Superior Court this — day of August, 1923.

H. I. Mulcrevy, Clerk, by —— ——, Deputy Clerk. (Seal.)

[File endorsement omitted.]

In Supreme Court of California. In Bank

Argument and Submission

The Supreme Court of California met in bank in its courtroom State Building, San Francisco, at ten o'clock A. M. this day. Present: Myers, C. J., presiding; Lawlor, J.; Lennon, J.; Waste, J.; Seawell, J.; Richards, J.; Shenk, J.; Taylor, Clerk, Lafferty, reporter; Hinkle, bailiff.

S. F. 10816. Engel v. Davenport. Hearing on merits. H. W. Hutton, Esq., appearing on behalf of appellant; J. B. McKeon, Esq., appearing on behalf of respondent. Cause argued and submitted.

[fol. 13] In Supreme Court of California, In Bank, August 25, 1924

S. F. No. 10816

E. B. Engel, Plaintiff and Appellant,

v.

J. O. Davenport et al., Defendants and Respondents.

Opinion—Filed Aug. 25, 1924

This is an appeal by the plaintiff from a judgment rendered and entered by the Superior Court in and for the City and County of San Francisco in favor of the defendants, based upon an order sustaining the demurrer of J. O. Davenport, one of the defendants, to the plaintiff's complaint. The action, which was instituted in the Superior Court of the City and County of San Francisco, was brought against J. O. Davenport and the other defendants jointly, as the owner and the operators of the steamship "Davenport". The complaint alleged in substance that the plaintiff had suffered injuries

because of the unseaworthiness of the vessel's appliances and in this behalf alleged that the vessel was unseaworthy when she left San Francisco, her home port, for Hoquiam, Washington, by reason of a defective pelican hook which broke at Hoquiam, Washington, [fol. 14] fracturing plaintiff's skull. For this injury plaintiff claimed damages in the sum of $50,000.00. Said complaint was filed in said Superior Court on the 18th day of January, 1923, twenty-one months after the injury to plaintiff which forms the basis of the action.

The defendant J. O. Davenport demurred upon two grounds, (1) that the complaint did not state facts sufficient to constitute a cause of action and, (2) that the alleged cause of action was barred by the provisions of section 340, subdivision 3, of the California Code of Civil Procedure, which provides that actions based upon personal injury must be commenced within one year. It is apparent that if the state statute of limitations is applicable, the demurrer was properly sustained.

It is plaintiff's contention that the plaintiff's cause of action is brought under the provisions of the Merchant Marine Act of June 5, 1920 (41 Stats. at large 1007), which amended section 20 of the Seaman's Act of March 4, 1915 (38 Stats. at Large, 1164); that section 33 of the Merchant Marine Act incorporates therein by reference the Federal Railway Employers' Liability Act of 1908 (35 Stats. at Large 65) as amended in 1910 (36 Stats. at Large, 291); that this last mentioned act provides a two year limitation for the commencement of actions brought under it; and that, therefore, such limitation applies to actions brought by seamen under the Merchant Marine Act.

Section 33 of the Merchant Marine Act, upon which plaintiff relies, reads as follows:

[fol. 15] "Any seaman who shall suffer personal injury in the course of his employment, may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Section 6, of the Federal Employers' Liability Act, claimed by plaintiff to be incorporated by reference into the Merchant Marine Act provides that, "No action shall be maintained under the act unless commenced within two years from the day the cause of action accrued. Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the

defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under [fol. 16] this Act, shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any State Court of competent jurisdiction shall be removed to any court of the United States."

It is the defendants' contention that, (1) if brought under section 33 of the Merchant Marine Act, the state court was without jurisdiction to entertain the action and, (2) whether brought under the Merchant Marine Act, as plaintiff contends, or under the general marine law as defendants contend, the one year state statute of limitations is applicable.

In the former opinion rendered by this court it was held that if the action was brought under section 33 of the Merchant Marine Act the state court was without jurisdiction, and if brought under the general maritime law, the state statute of limitations was applicable, so that in either event the demurrer was properly sustained. The holding that the federal court had exclusive jurisdiction of all actions brought under section 33 of the Merchant Marine Act was based upon the theory that Congress plainly indicated an intention to vest exclusive jurisdiction of all cases arising under said section in a court in the district in which the defendant employer resided, by the provision of said section previously quoted, that "jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located". This theory was sustained by decisions of the Supreme Court of New York (Nox v. U. S. Shipping Board Emergency Fleet Corporation, 193 N. Y. S. 340; Preto v. U. S. Shipping Board Emergency Fleet [fol. 17] Corporation, 193 N. Y. S. 342), and the District Court of Washington (Wenzler v. Robin Line S. S. Co., 277 Fed. 812.)

However, the Supreme Court of the United States in a very recent decision (Panama Ry. Co. v. Johnson, 44 Sup. Ct. Rep. 391) held, in effect, that this provision of the Merchant Marine Act did not confer exclusive jurisdiction upon the particular district court of the district in which the defendant employer resides and thereby by implication divest all other courts previously having jurisdiction of such actions, of jurisdiction, but merely defined the venue of an action instituted in a district court. The court in that case held that a complaint having been filed in a district court of a district other than the one in which the defendant employer resided, and no objection having been made at the outset on a special appearance, any objection to the venue was waived by the general appearance and the court where the complaint was filed had jurisdiction. The court in this behalf said: "A reading of the provision now before us * * * makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the District Courts * * * but only to prescribe the venue for actions brought under the new act of which it is a part." It follows that if this provision merely defines the "venue" of an action, the theory

that such provision conferred "jurisdiction" upon a particular court [fol. 18] is no longer tenable. And in the absence of any other provision purporting to divest of jurisdiction those courts, both state and federal, which, prior to the enactment of the Merchant Marine Act had jurisdiction of such actions, such jurisdiction may be presumed to continue.

We are satisfied that the state courts have always had the right to enforce rights of action for personal injuries to seamen arising under maritime transactions, including those arising out of maritime torts, since the Federal Judiciary Act of 1789, which provided that district courts should have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." (Judical Code, secs. 24 and 256.) (Comp. Stats. secs. 991 and 1233); The Hamilton, 207 U. S. 398, 404; Steamboat Company v. Chase, 83 U. S. 522, 534; Leon v. Galceran, 11 Wall. 185; Knapp, Stout & Co., v. McCaffrey, 177 U. S. 638.) In enforcing a liability falling within the admiralty and maritime jurisdiction, the state court was, however, bound to apply the maritime law. (Southern Pacific Co., v. Jensen, 244 U. S. 205; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372.)

The present action is based, not upon negligence, but upon the alleged unseawothiness of the vessel "Davenport", by reason of a defective pelican hook, and there can be no question but that in such an action the state courts, prior to the enactment of the Merchant Marine Act, did have and did exercise jurisdiction in such [fol. 19] cases. This was definitely decided in the case of Carlisle Packing Co., v. Sandanger, 259 U. S. 255, and is, in fact, conceded by the defendants. This being so, it follows that the state courts still have jurisdiction over such an action and that the plaintiff could at his election institute the action in the state court.

It is the plaintiff's theory, as hereinbefore indicated, that section 33 of the Merchant Marine Act incorporates therein, by reference the Federal Railway Employer's Liability Act, which latter act provides a two-year limitation for the commencement of actions brought thereunder, and that therefore, the two-year limitation for the commencement of actions applies to this action irrespective of whether it was commenced in a state or federal court. In other words, it is plaintiff's contention that the statute of limitation embodied in the Federal Employer's Liability Act applies to every cause of action stated thereunder or under the Merchant Marine Act regardless of the jurisdiction in which such action is brought. Plaintiff's theory that the Federal Employer's Liability Act was incorporated by reference in the Merchant Marine Act was upheld in the case of Martin v. United States Emergency Fleet Corporation, a recent decision of the United States District Court of New York, rendered June 6, 1924. However, in the case of Lorang v. Alaska S. S. Co., et al., a recent decision of the United States District Court of Washington, decided May 14, 1924, this contention [fol. 20] was expressly repudiated.

Conceding, however, for the sake of argument, that the provision of the Federal Employer's Liability Act fixing the period of time within which actions brought thereunder must be commenced at two years was incorporated by reference into the Merchant Marine Act and would be applicable when the action was brought in a Federal Court, we are of the opinion that the instant action having been originally, and rightfully instituted in the state court, is governed and barred by the state statute of limitations. It is the general rule that the lex fori, i. e. the limitation statute of the jurisdiction where suit is brought, will govern and control with reference to the prescribed period of time within which a suit may be brought in that particular jurisdiction. Plaintiff, however, contends that when a time limit appears in a statute creating a right, that time limit is exclusive of all others. Plaintiff also insists that it is not essential that the limitation be incorporated in the same section or even in the same statute providing the limitation embodied in another statute is so specifically directed to the newly created liability as to warrant the conclusion that it qualifies the right.

It is true that there is an exception to the general rule that the law of the forum controls to the effect that when a statute which creates a new liability limits the time within which the right may be enforced, an action seeking to enforce such right can be maintained [fol. 21] only within the time limited by the statute creating the right, regardless of the jurisdiction in which the action was instituted. (Davis v. Mills, 194 U. S. 451, 454; The Harrisburg, 119 U. S. 199, 214; Vaught v. Virginia & Southwestern Railroad 132 Tenn. 679.) Such exception to the general rule is not, in our opinion applicable to the instant case.

The exception to the general rule that the law of the forum governs is based upon the reasoning that when the liability and the remedy are created by the same statute, time is made of the essence of the right, and when the time prescribed by the statute has expired, the cause of action itself is extinguished. The lapse of time prescribed by the statute creating the new right having operated to extinguish the right, no right remains thereafter to support the action and consequently no action can be thereafter maintained in any jurisdiction. Obviously this reasoning applies only when the period prescribed by the statute creating the liability is shorter than the period provided by the law of the forum. There is no logical reason why the doctrine that the limitation prescribed by the statute of another jurisdiction, which creates a right of action, is a condition of the right of action so that the latter is extinguished when the time so prescribed has expired, and will not thereafter sustain an action anywhere, should exclude the operation of the general rule which refers the question of limitation to the law of the forum, if the period prescribed by the statute of the other jurisdiction creating [fol. 22] the liability has not expired. (46 L. R. A. (N. S.) 687.) The exception to the general rule being based upon the theory of the extinguishment of a right by the lapse of time, if the time prescribed by the statute creating the right is longer than the time

provided by the law of the forum, such actions will not fall within the exception but will be governed by the general rule that the law of the forum—in the instant case, the state statute of limitations—will prevail. (Weaver v. Baltimore & O. T. Co., 21 D. C. 499; Hutchings v. Lamson, 96 Fed. 720; Wharton on Conflict of laws, 3rd. ed. Sec. 540B, Vol. 2, p. 1261.) The reason for the exception ceasing to exist the exception itself ceases to exist.

The judgment is affirmed.

Lennon, J.

We concur: Seawell, J.; Richards, J.; Lawlor, J.; Waste, J.; Shenk, J.; Myers, C. J.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

On Appeal From the Superior Court in and for the City and County of San Francisco

JUDGMENT—Filed Aug. 25, 1924

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged and decreed by the Court that the judgment of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby affirmed. Respondent to recover costs of appeal.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 25th day of August, 1924, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 25th day of September, A. D. 1924.

B. Grant Taylor, Clerk, by I. M. Johnson, Deputy.

4592.

[fol. 24] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING AND MODIFYING OPINION—Filed Sept. 24, 1924

By the COURT:

The petition for a rehearing is denied. That portion of the opinion however, which deals with the plaintiff's right of election to institute the action in the State Court is amended and modified to read as follows: "This being so, it follows that the State Courts still have jurisdiction over such an action and that the plaintiff could at his election institute the action in the State Court unless such jurisdiction has been divested by the adoption of the Workmen's Compensation Provisions of our constitution and statutes, a question which we shall not now undertake to decide. (68 Cal. Dens. at p. 174)."

Dated September 22, 1924.

[File endorsement omitted.]

IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Sept. 24, 1924

[fol.25] Plaintiff and appellant designates and files the following assignment of errors upon which he will rely on his petition to the Supreme Court of the United States, for a Writ of Certiorari to review the proceedings of the Supreme Court of the State of California and its decision and final decree in the above cause, and in that behalf shows and says:

That the said Supreme Court of the State of California, erred in its proceedings, and its decisions and judgement in the above-entitled cause, in the following particulars:

1. In finding and deciding that the statute of limitations contained in Section 6 of the Act of Congress of April 5th, 1910, 36 Stat. 291, reading in part:

"Section 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

did not apply to plaintiff and appellant's cause of action.

2. That the said Supreme Court of the State of California, erred finding and deciding that the statute of limitations of the State California, applied to plaintiff and appellant's cause of action.

3. That the said Supreme Court of the State of California, erred not finding and deciding that the Workmens Compensation Laws the State of California, did not apply to plaintiff and appellant's use of action.

H. W. Hutton, Attorney for Plaintiff and Appellant.

[File endorsement omitted.]

[fol. 26] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 24, 1924

To the Clerk of the Supreme Court of the State of California:

Please prepare for the purpose of a petition to the Supreme Court for a Writ of Certiorari in the above cause, a certified copy of the following papers, to-wit:

1. The transcript of the proceedings in the Superior Court of the State of California, in and for the City and County of San Francisco said cause.

2. The minute order of the Supreme Court of the State of California submitting said cause for decision, given and made on the 8th day of May, 1924.

3. The opinion of said Supreme Court of the State of California, dated August 25, 1924.

4. The final judgment of said Supreme Court of the State of California herein.

5. The assignment of errors.

6. This request for said transcript, and the order of said Supreme Court of the State of California, denying plaintiff and appellant's [fol. 27] petition for a rehearing, and modifying its opinion of date August 25, 1924.

Yours etc., H. W. Hutton, Attorney for Plaintiff and Appellant.

[File endorsement omitted.]

In Supreme Court of California

[Title omitted]

Clerk's Certificate

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing consisting of twenty-eight pages including the next page, is a full, true and correct and complete Transcript of the Record on Appeal in this Court, comprising the record on appeal from the Superior Court of the State of California, in and for the City and County of San Francisco to [fol. 28] this Court, Minute order submitting said Appeal, opinion of the Court thereon, final judgment on said appeal, order denying a rehearing, and modifying opinion, assignment of errors, and præcipe for preparation of said record, and I further certify: That the said Supreme Court of the State of California, is the Court of last resort in this State on said Appeal.

In witness whereof, I have hereunto set my hand, and affixed the Seal of the Court this 11th day of October, A. D. 1924.

B. Grant Taylor, Clerk of Supreme Court of the State of California, by A. V. Haskell, Deputy Clerk Supreme Court
(Seal of the Supreme Court of California.)

Oct 11, 1924.—Cost of preparation and certification of this record was $5.20. A. V. Haskell.

[fol. 29] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR CERTIORARI—Filed December 15, 1924

On Petition for Writ of Certiorari to the Supreme Court of the State of California

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of California, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(8097)